

THE CONSUMER & GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT TO
REFRESH THE RECORD ON THE COMMISSION'S RULES GOVERNING INTERSTATE
PAY-PER-CALL & OTHER INFORMATION SERVICES
CC DOCKET NO.: 96-146

**COMMENTS OF
NETWORK FOR ONLINE COMMERCE
(NOC)**

May 12, 2003

BACKGROUND

The Federal Communications Commission ("the Commission") has requested public comment from interested parties to "refresh the record" concerning the Commission's Order and Notice of Proposed Rulemaking ("NPRM") to amend the Commission's Pay-Per-Call Rule.

These comments are submitted on behalf of the above-captioned organisation, hereinafter referred to as "NOC," an international trade forum representing the interests of the Telemedia industry worldwide and at all levels including network operators, premium rate telephone service providers, wireless marketing and content and infrastructure suppliers.

The proposed rule changes include a provision in which the Commission attempts to redefine the Congressional definition of "pay-per-call" services which the NOC believes to be seriously flawed, as it will exceed the Commission's authority, be anti-competitive, overbroad, unduly restrictive and discriminatory and violate the First Amendment to the U.S. Constitution. It will in our view exceed the scope and intent of the Telecommunications Act of 1996.

The proposed rule changes, if enacted, will increase dominance by the major carriers, inhibit development and growth of diverse services available to the general public, increase prices to consumers, and seriously restrict the free exchange of thoughts and ideas, in violation of the First Amendment.

It is significant that the USA is currently unable to demonstrate a stable, vibrant and

profitable pay-per-call industry such as those found elsewhere to satisfy the clear demands and aspirations of a sophisticated customer base. It is the NOC view that this situation is the result of well meaning but ill conceived regulatory constraints applied to the USA market which have not permitted the freedom of the individual to make a choice in a fully informed environment. To be blunt inappropriate and disproportionate regulation has made a major contribution to the demise of the pay-per-call industry in the USA and the detrimental effect this will have on the future of electronic commerce in the USA should not be underestimated.

For these reasons, the FCC should abandon its proposed rule change.

I.

THE PROPOSED CHANGES EXCEED THE COMMISSION'S AUTHORITY.

Congress has already clearly defined pay-per-call and requires that the caller must pay a per-call or per-time-interval charge that is greater than or is in addition to the charge for the transmission of the call. What the Commission is proposing is to redefine pay-per-call in a manner, which is inconsistent with the original definition.

Nor does the Commission have the power or the authority to do so. Congress expressly granted the Federal Trade Commission (FTC) authority to extend the definition of pay-per-call services to other similar services.

It is noteworthy that Congress granted the FTC the authority to do what the Commission proposes to do, but did not grant the Commission the same authority. This expression of Congressional intent is clear and the Commission should respect Congress's division of responsibility.

II.

THE PROPOSED RULE WILL IMPOSE AN UNCONSTITUTIONAL BURDEN ON FREE SPEECH.

The First Amendment was designed to prevent the majority, through Acts of Congress, from silencing those who would express unpopular or unconventional views. Through the use of the proposed change in the 900-service rule, the Commission appears to seek to silence the voice of Americans most in need of an open, convenient, and affordable forum for the free, unfettered expression of divergent views.

Exempt from the scope of the proposed changes are common carrier directory services, telecommunications services for the deaf, and the purchase of goods or services, which are not “information services”. The result of this is that that Congress and/or the Commission have decided that certain messages are deserving of unfettered public access, while other constitutionally protected messages are to be discouraged and unduly burdened with regulatory preambles and other hindrances established by the 900-service arena. The proposed rule, in effect, eliminates the entire domestic and international (“one plus” and 011 dialling patterns) long distance forums as a meeting place for the free flow of ideas between individuals with common interests unless those participants agree to give up substantial privacy rights. This is surely unconstitutional.

The First Amendment plainly prohibits the Commission from discriminating or favouring one information provider over another based upon the content of the message. The proposed rule, in conjunction with the resultant increase in cost to consumers which will result from being forced into the 900-service arena and/or having to deal with the cost and inconvenience of pre-subscription agreements will discourage consumers from utilizing many services while completely preventing others from gaining access to this vibrant and limitless source of information at all. The attempted regulation of the content of speech is more likely to interfere with the free exchange of ideas than

to encourage it.

The proposed regulations will certainly increase the cost of information transmission and will discourage and hinder individuals' and society's right to receive information of public interest necessary to the sustenance of an intelligent and well informed populace.

Even if the statutory and regulatory schemes could be viewed as content- neutral, which they cannot, it

is readily apparent that less onerous, less restrictive, and less disruptive means are available to advance the Commission's apparent goal of protecting us from ourselves.

It is the NOC experience that consumers are best protected by the acceptance of individual responsibility and by a process of education. Any process of service or content restriction has the effect of denying current and future services to the majority of responsible consumers for the supposed benefit of the irresponsible few. The NOC favours and promotes freedom of choice in a fully informed environment and working alongside light-handed regulation.

Banning information services from the "one plus" and "011" marketplace is unacceptable, unnecessary and disproportionate provided standards are in place to ensure consumers are totally informed. Far simpler, economical, and effective than the 900-service arena, with its associated preamble and lack of access to the international market and lack of portability, would be the requirement of a conspicuous and straight-forward written disclosure on print advertisement:

ORDINARY TOLL CHARGES WILL APPLY; CHECK WITH YOUR LONG-DISTANCE CARRIER FOR RATES.

This would rectify the Commission's apparent concern that the American public does not realize that a call to another area code or another country is not a free call.

The Commission cannot justify the proposed change and the ensuing impact it will have upon consumers' free speech and free association rights.

III.

THE PROPOSED RULE CHANGE IS ANTI-COMPETITIVE AND PRO MONOPOLISTIC.

The legislative history surrounding the Telecommunications Act of 1996 reveals that the purpose of the Act was to promote competition, especially among small businesses, and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies, particularly in rural markets. It is clear that the primary concern in the pay-per-call arena stemmed from toll free telephone number abuse.

Unfortunately, the clear intent of the proposed rule change is to relegate all interstate "Information" telephone transmissions to 900-service. It is a fact that AT&T dominates 900-service and by forcing all information-based transmissions to the 900-service arena, AT&T's dominance is magnified and promoted. This is not what the original regulation sought to achieve.

Moreover, 900-service lacks portability, a characteristic that is essential to ensure access to all regional markets and thus promote, rather than inhibit, competition. It is well known that providers of information services rely heavily on customer loyalty to particular phone numbers through advertising. Without portability, free movement throughout the regional markets is

eliminated and competition suffers. Ultimately, it is the consumer who suffers as a result of the lack of choice for the services they seek.

If all information services were relegated to 900-service or pre-subscription requirements, the result would be extremely damaging to electronic commerce. A concrete example comes from Pennsylvania, which required all information services to be either 900-service, or have formal, written pre-subscription agreements. Ultimately, in the entire state only 700 consumers signed up for pre-subscriptions. Pennsylvania has over 12 million people. This remarkably small number of subscriptions (.0075% of the population) is testimony to the fact that if consumers are overburdened with unnecessary regulations, there is a negative effect upon service usage and availability, which ultimately benefits no one. This negative effect of pre-subscription or opt-in has been observed in other markets and has been abandoned as ineffective and a barrier to service development.

Ultimately, the proposed rule stifles competition and legitimate economic enterprise and would have the adverse effect of encouraging a de-facto monopoly.

IV.

THE PROPOSED RULE CHANGE IS

OVERLY BROAD AND UNDULY RESTRICTIVE.

Information providers process over 5 million calls per month, which translates into 30 million minutes per month in international calls alone. The rare complaints that surface regarding long-distance telemedia calls invariably involve the unauthorized use of a telephone (theft) or where a teenager makes a telephone call without parental permission. In reality, all long distance calls,

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domestic and international, are subject to problems of this nature. This is not a reason to relegate calls, which are billed at customary and reasonable rates into 900-service.

Modifying the definition of pay-per-call to include domestic and international information service long-distance calls billed at reasonable and customary rates set by independent long-distance carriers is illogical when considering non-deniability factors. There is absolutely no basis on which to distinguish 1+ or International information service calls from other long distance calls. Taken to its logical conclusion, in order to make those calls non-deniable, all long-distance calls would have to be made non-deniable.

Moreover, modifying the definition of pay-per-call to include telecommunications services provided at reasonable and customary long-distance rates without charging the subscriber any premium whatsoever unreasonably restricts access to these services by the general public in a number of ways. It is a fact that 900-service is more expensive to the consumer because of the bad debt (charge backs) created by abuse and poor administrative control of the deniable nature of the charge. Because of the significant bad debt write-offs, the providers must charge more for their services, resulting in an otherwise unnecessary additional expense to the consumer.

Recently a significant number of licensed exchange carriers have indicated their wholesale refusal to process any 900-service whatsoever. Ultimately, consumers previously served by these carriers will lose access to services if the proposed regulations take effect.

Additional market restrictions include the inability of the general public to access 900-service from pay phones. As a consequence, those who cannot afford or who do not wish to have their own phones are denied access to services altogether. The inability to access services from a pay phone also eliminates caller anonymity as caller identity is revealed as a matter of course in a 900 call.

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Service through 900 is also unavailable at most hotels; businesses and car phones so further restricting market access. Moreover, 900 numbers are inaccessible to callers from out of the country. The Commission's proposed actions will not only deprive foreign consumers access to services, they will prevent domestic providers from capitalizing on the international market. This prohibits smaller U.S. carriers from addressing niche markets in overseas territories that are still monopolistic or otherwise lagging behind the U.S. telecommunications markets in deregulation. Further, the Commission will restrict domestic providers from creating additional demand for U.S. goods and services in these international markets, especially as it relates to the promotion of tourism, software products and telecommunications equipment.

The NOC finds it quite unreal that service providers in America are forced to render a bill advising the consumer that there will be little or no consequence for failing to pay. Consumers intent upon defrauding the information services industry know quite well that any collection attempts outside of the phone bill are expensive, ineffectual, and heavily regulated at the state level, and, therefore, are not likely to be attempted. The catastrophic effect that this has had on the American pay-per-call industry cannot be overstated.

V.

900 SERVICE IS NOT AN OPTION.

AT&T has abandoned billing for most services and notified customers that they will be discontinuing transport as of December 31, 2003. In a similar vein, MCI currently does not accept new applications for service and only provides services through a limited number of brokers.

It makes no sense to change the definition of pay-per-call if the result is to force conversion

to 900-service, and then announce that 900-service will not be available. So all that is left is pre-subscription and credit card use, neither of which can be a sensible substitute for the spontaneous segment of pay-per-call.

The lack of a 900-service would have a drastic effect on the nation's telephone service and AT&T has not proposed any viable substitutions. There would be a vacuum, which would go unfilled. AT&T has proposed a pre-subscription arrangement, but as discussed earlier this would not reach very many customers. It appears to NOC that there are options, which have not been explored, which would permit the operation of 900-service in the USA in a well-managed and professional manner. These would include consumer education, advertising standards and effective and responsible credit control supported by selective service blocking, none of which are particularly high tech or difficult to implement.

In summary, the NOC believes that the American pay-per-call industry is missing a significant opportunity to organise itself into the multi-billion dollar business that its customers deserve. It can learn valuable lessons from other international markets before, inevitably, becoming the world leader in the field. However, this will not be achieved in the presence of intrusive, disproportional and unnecessary regulation.

Respectfully submitted,

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